NO. 84132-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON



IN RE THE TERMINATION OF A.R. AND D.R.

# AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Jared Van Kirk
WSBA # 37029
Garvey Schubert Barer
1191 Second Avenue, Suite 1800
Seattle, WA 98101-2939
(206) 464-3939

Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
M. Rose Spidell, WSBA #36038
ACLU-WA Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98168
(206) 624-2184

Attorneys for *Amicus Curiae* American Civil Liberties Union of Washington

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## I. ISSUE ADDRESSED BY AMICUS CURIAE

Do children in parental rights termination proceedings have a right to counsel under the due process clause of the Washington Constitution?

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, and nonprofit organization with more than 20,000 members that is dedicated to preserving and defending civil liberties, including the right to counsel and the due process rights of juveniles. It has participated as amicus in several cases involving the civil liberties of juveniles. *See, e.g., Bellevue Sch. Dist. v. E.S.*, 148 Wn.App. 205, 199 P.3d 1010 (2009), *rev. granted*, 166 Wn.2d 1011, 210 P.3d 1018 (2009).

## III. SUMMARY OF RELEVANT FACTS

The following facts are based on the evidence in the record as described by the parties' briefs. In August 2008, the Stevens County Superior Court issued an order terminating Tonya Roberts' parental rights to her two children, DR, a girl, born March 1996, and AR, a boy, born April 1997. Both children have significant emotional and behavioral needs. The two children have lived in separate foster homes for at least two years and have not had regular visits or contacts with each other. At the time the case was pending in the Court of Appeals, neither child was in a permanent placement nor were they likely to be adopted. In some of the

placements, the children were subjected to administration of psychotropic drugs. AR was involuntarily confined in a long-term psychiatric facility for over a year because of his significant emotional and behavioral needs. Because the State had legal custody of AR in the dependency/termination case, it "consented" to AR's institutionalization without a court order and without AR having an attorney.

A volunteer non-attorney CASA (court-appointed special advocate) was appointed by the trial court as guardian ad litem for both children. DR expressed a desire to continue a relationship with her mother. The CASA argued for termination of the mother's rights, directly contrary to DR's expressed interest. The mother requested appointment of counsel for DR in the trial court and that request was denied. Based on the State's concession of error, the Court of Appeals ruled both children had a statutory right to appointment of counsel. This Court has taken review to decide whether children in parental rights termination proceedings have a constitutional right to counsel.

## IV. ARGUMENT

### A. Children Have a Fundamental Liberty Interest in the Relationship with Their Parents, and a Right not to be Deprived of Their Family Without Due Process.

This Court should find that children in parental rights termination proceedings have a state constitutional right to counsel. It is beyond

question that children not only have constitutionally protected liberty interests at stake in proceedings where their relationship to their parents and families may be permanently severed, but that they are fundamental interests of the highest order. As the Children's opening brief explains, these are "proceedings that turn over almost all decisions about one's life to the State, require years of court involvement, monthly interactions with a State agent, and the constant risk of placement in another stranger's home or an institution for reasons which may be unknown to the child."

The Washington State Supreme Court has recognized that just as parents have a fundamental liberty interest in the custody and control of their children, a fundamental liberty interest inheres in "the child in having the affection and care of his parents." *Moore v. Burdman*, 84 Wn.2d 408, 411, 526 P.2d 893 (1974). These corresponding rights, though not identical in kind, are of equally significant weight – "it is no slight thing to deprive a parent of the care, custody, and society of a child, *or a child of the protection, guidance, and affection of the parent.*" *Id.* at 412 (*quoting In re Day*, 189 Wash. 368, 381-82, 65 P.2d 1049 (1937) (emphasis added)). "The importance of familial bonds accords constitutional protection to the parties involved in judicial determination of the parent-child relationship." *State v. Santos*, 104 Wn.2d 142, 146, 702 P.2d 1179 (1985). This tradition of protection of the parent-child relationship has a

long history. *See In re Welfare of Luscier*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (noting that Washington cases have recognized the fundamental nature of the parent-child relationship since 1894 and that the relationship can be described as "more precious to many people than the right of life itself").

No less in federal courts, the "most essential and basic aspect of familial privacy" is "the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the companionship, care, custody and management of his or her children and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2nd Cir. 1977) (*quoting, inter alia, Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 844 (1977)). Children's interest in their familial relationships and their right to family integrity is widely recognized as a fundamental liberty interest. *See, e.g., id.*; *Franz v. United States*, 707 F.2d 582, 595 (D.C. Cir. 1983) (holding that a father and children each possess a fundamental liberty interest in each other's companionship); *C.A. Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1018-19 (7th Cir. 2000) (finding that a forced separation from his

parents implicated child's fundamental constitutional right to familial relations); *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000) ("Parents and children have a well-elaborated constitutional right to live together without governmental interference."); *Suboh v. Dist. Attorney's Office of the Suffolk Dist.*, 298 F.3d 81, 91 (1st Cir. 2002); *Doe v. Heck*, 327 F.3d 492, 518 (7th Cir. 2003). Recognizing the importance of children's constitutionally protected interests at stake in parental rights termination cases is critical to understanding why state due process compels a right to counsel.

### B. Children's Due Process Right to Counsel in Termination Proceedings Is a Matter to be Decided Under Washington State Constitution Article 1, Section 3.

This Court has recognized the fundamental nature of the parent-child relationship. This Court has also acknowledged the *need* for independent legal representation for children when that relationship is at stake. *In re Parentage of LB*, 155 Wn.2d 679, 712, n.29, 122 P.3d 161 (2005) ("[W]e strongly urge trial courts in this and similar cases to consider the interests of children in dependency, parentage, visitation, custody, and support proceedings, and whether appointing counsel, in addition to and separate from the appointment of a GAL, to act on their behalf and represent their interests would be appropriate and in the interests of justice."). However, because the question of whether due

process *requires* the right to counsel for children in parental rights termination proceedings has not been previously resolved under federal or state constitutional jurisprudence, a state constitutional analysis is necessary.

Where neither federal nor state jurisprudence have resolved a matter of constitutional dimension, it is beyond dispute that "this court will first independently interpret and apply the Washington Constitution in order, among other concerns, to develop a body of independent jurisprudence, and because consideration of the United States Constitution first would be premature." *City of Seattle v. Mesiani*, 110 Wn.2d 454, 458, 755 P. 2d 775 (1988) (*citing State v. Coe*, 101 Wn.2d 364, 374, 679 P.2d 353 (1984)). "An independent interpretation and application of the Washington Constitution is not just legitimate, historically mandated, and logically essential; it is, in the words of the Washington Supreme Court, a 'duty' that all state courts owe to the people of Washington." Robert F. Utter & Hugh D. Spitzer The Washington State Constitution: A Reference Guide 4 2002 (citation omitted). Since the early years of statehood, Washington has been deciding cases based on its own constitution without concern for whether results under the federal constitution would be different. *See Grant County. Fire Protection Dist. v. City of Moses Lake*, 150 Wn.2d 791, n.12, 83 P.3d 419 (2004).

### 1. No *State v. Gunwall* Analysis is Required or Appropriate to Find a Right to Counsel in this Case Because no Federal Decision Addresses Children's Right to Counsel in Termination Proceedings.

In some circumstances an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), may be necessary before considering the scope of individual rights under the Washington State Constitution, but this is not one of those cases. Where there is no existing interpretation of federal constitutional rights from which parallel rights under the state constitution could diverge, neither the rules nor reasoning of *Gunwall* apply. Consequently, the Court must first resolve the rights in question under the Washington State Constitution.

If anything, *Gunwall* and our federalist system encourage this Court's robust development of state constitutional law in these circumstances. *Gunwall*, 106 Wn.2d at 60 (lamenting state constitutional decisions that "furnish little or no rational basis for counsel to predict the future course of state decisional law"); *Coe*, 101 Wn.2d at 373-74 ("state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system . . . by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied").

The Court in *Gunwall* was concerned with federalism and, specifically, "that a considerable measure of cooperation [between federal and state courts] must exist in a truly effective federalist system." *Gunwall*, 106 Wn.2d at 60. While recognizing that Washington "has the sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution" and that federal constitutional law is "not controlling on state courts construing their own constitutions," the Court found that some measure of consistency between federal and state constitutional law is desirable. *Id*(citations omitted). These concerns for federalism, however, do not compel consistency in all cases and are compatible with finding a state constitutional right to counsel in this case, where the fundamental liberty interests of children in their family relationships are at stake.

The chief concern of *Gunwall* is restricting interpretations of the Washington State Constitution that "establish no principled basis for *repudiating federal precedent*." *Id* (emphasis added). Indeed, the six nonexclusive factors outlined in *Gunwall* were directed to "determining whether, *in a given situation*, the constitution of the State of Washington should be considered as *extending broader rights* to its citizens than does the United States Constitution" and insuring that decisions on state constitutional grounds do not "merely *substitut[e]* our notion of justice for

that of duly elected legislative bodies or the United States Supreme Court." *Id.* at 61, 63 (emphasis added). At issue in *Gunwall* was whether Article 1, Section 7 of the Washington State Constitution barred obtaining telephone records without a warrant. A prior United States Supreme Court decision held that the Fourth Amendment did not bar this practice. This conflict between an existing United States Supreme Court decision and a more protective interpretation of the Washington State Constitution on exactly the same legal issue raised federalism concerns and called for a reasoned analysis of whether the state constitution extended broader rights. *Id.* at 63-65.

*Gunwall's* concerns and procedures are simply not raised where there is no existing federal constitutional decision that this Court is being urged to depart from on state constitutional grounds.[1] Concern for federalism, cooperation, and uniformity does not exist where the scope of constitutional rights has not been determined under either the federal or state constitution.

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[1] *Cf. State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998) ("We begin our [*Gunwall*] analysis with an overview of the federal right . . . *because we must first understand the breadth of that right before we can determine whether our state . . . provides greater protection . . . .*" (emphasis added)); *see also State v. Martin*, 151 Wn.App. 98, 105, 210 P.3d 345 (2009) (finding that the Court must first analyze the United States Supreme Court opinion establishing the challenged federal law *before* a *Gunwall* analysis is possible).

This is precisely the situation of the Court in this case and, therefore, *Gunwall* does not apply. The only Supreme Court decision supposedly necessitating a *Gunwall* analysis is *Lassiter v. Dep't of Social Serv.*, 452 U.S. 18, S.Ct. 2153, 68 L.Ed.2d 640 (1981). But *Lassiter*, of course, does *not* hold that children are not entitled to the assistance of counsel in termination proceedings under the Fourteenth Amendment.[2] Nor could *Lassiter's* decision concerning *parents'* rights be considered a federal resolution of *children's* rights under *Gunwall*. As discussed above, children have fundamental liberty interests at stake in termination proceedings. These interests were not addressed by the *Lassiter* Court.

Additionally, *Lassiter* found that parents are "*likely* to be people with little education, who have had uncommon difficulty in dealing with life" who are, therefore, "thrust into a distressing and disorienting situation." *Lassiter*, 452 U.S. at 30 (emphasis added). This led the *Lassiter* Court to the conclusion that "the complexity of the [termination] proceeding and the incapacity of the uncounseled *parent* could be, *but would not always be*, great enough to make the risk of an erroneous deprivation of the *parent's* rights insupportably high." *Id.* (emphasis

[2] Indeed, the *Lassiter* court noted that the children affected by that termination *were* appointed counsel as a matter of statute. *Lassiter*, 452 U.S. at 28. Their constitutional right to counsel, therefore, could not have been at issue or decided.

added). However, it cannot be gainsaid that a *child* is *always* and *inherently* undereducated, inexperienced in coping with life, and overwhelmed by any formal termination proceeding. These unique disadvantages were also not addressed by the *Lassiter* Court. The *Lassiter* conclusion that an *adult's* disadvantages may not always be great enough to create insupportable risk of error simply cannot, and was not intended to, answer the question of whether a *child* would need counsel as a matter of course to ensure adequate due process.

Moreover, *Gunwall* as written and applied by this Court is specific to the context in which individual constitutional rights are asserted. *Gunwall* made clear that its six nonexclusive factors were offered to help determine whether the state constitution extended broader rights "in a given situation." *Gunwall*, 106 Wn.2d at 61. Subsequent application of *Gunwall* is even clearer that its analysis applies not to constitutional provisions generically, but to each application of a constitutional provision to specific individual rights. *See State v. Ortiz*, 119 Wn.2d 294, 304, 831 P.2d 1060 (1992) (declining to follow earlier broad interpretation of state constitution with respect to different contested rights). *Gunwall*, therefore, does not require this Court to distinguish federal precedent limiting *parents'* right to counsel in order to find a right to counsel for *children* in termination proceedings under the state constitution.

### 2. Even if the *Gunwall* Factors are Applied, they Support Finding a State Constitutional Right to Counsel for Children in Termination Proceedings.

Even were *Gunwall* to apply, its demand for a principled reason to adopt a broader state constitutional rule is more than met with respect to the compelling circumstances supporting children's right to counsel in parental termination proceedings. *Gunwall's* prescription for balancing the need for a certain amount of uniformity in a federalist system with the inherent right of states to afford greater individual rights under state constitutions is to limit only *arbitrary* resort to state constitutional law where parallel federal constitutional law already exists. *Gunwall*, 106 Wn.2d at 62-63. Affording citizens their full individual rights under the Washington State Constitution is both correct and desirable, so long as there is a principled reason to do so.

In some criminal procedure circumstances Washington courts have held under *Gunwall* that Article 1, Section 3 is coextensive with federal interpretations of the Fourteenth Amendment. These decisions do not control here. This Court has been clear that a *Gunwall* analysis is contextual – no decision has held or should hold that Article 1, Section 3 in general never requires a broader state law interpretation. If a *Gunwall* analysis is conducted, that analysis must deal directly with the context of

children's right to counsel in termination proceedings and eschew any consideration of Article 1, Section 3 in different contexts.

There are several compelling reasons, both within and outside the six nonexclusive *Gunwall* factors to decide that children have a right to counsel in termination proceedings under Article 1, Section 3 of the Washington State Constitution. Of course, the *Gunwall* factors are expressly nonexclusive, suggesting that decisions to reach the state constitution on other principled grounds are both possible and acceptable. *Gunwall*, 106 Wn.2d at 61.

First, there is no binding federal decision denying the right to counsel for children in termination proceedings – that in itself is a principled reason to decide the scope of the right at issue on state constitutional grounds.[3] Although state courts are empowered to construe and apply the federal constitution when called for, this Court has held that "consideration of the United States Constitution first would be premature." *Mesiani*, 110 Wn.2d at 458; *Coe*, 101 Wn.2d at 373-74.

Second, *Lassiter* itself expressly invites and promotes more expansive rights under state law. *Lassiter* 452 U.S. at 33-34 ("A wise

[3] The only trial level federal court to reach this issue found that children *are* entitled to counsel in termination and dependency proceedings under the Fourteenth Amendment. *Kenny A. ex rel. Winn v. Purdue*, 356 F. Supp 2d 1353 (N.D. Ga. 2005).

public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. . . . The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise."). The concern for federalism and uniformity expressed in *Gunwall* is in no way implicated where the United States Supreme Court has expressly invited expanded protections at the state level and stated that such broader protections may be *required* to fulfill state policies. This statement indicates that the Court should have no special concerns over adopting a broader state law rule and, indeed, a decision more protective of the fairness of the termination proceeding, in the form of children's right to counsel, is encouraged.

Additionally, the *Gunwall* nonexclusive factors support finding a right to counsel for children in this case under the Washington State Constitution. In particular the fourth *Gunwall* factor independently supports finding a state due process right to counsel. Under this factor state law that precedes a claim of constitutional right may demonstrate the proper scope of that right under state law. *Gunwall*, 106 Wn.2d at 61-62. Contrary to the State's contention, the state law relevant to this factor is not limited to law in existence at the time the Washington State Constitution was adopted. State's Brief, pp. 46-47. *Gunwall* itself cited a

long history of state law protections, including statutes from 1881 and 1901 as well as then-current statutes and court decisions. *Gunwall*, 106 Wn.2d at 66.

Washington case law and statutes both pre- and post-dating *Lassiter* demonstrate that the presumption against a right to counsel, even in cases where the fundamental liberty interest in a parent-child relationship is at stake, is not part of the state constitution. The principal holding of *Lassiter* was that under the Fourteenth Amendment in right to counsel cases the *Matthews v. Eldridge* balance of interests and risks must, in turn, be weighed against a presumption that there is no right to counsel unless an individual's physical liberty is at risk. *Lassiter*, 452 U.S. at 31. Because parents' physical liberty was not at stake (or at least not always at stake), the *Lassiter* court concluded that the presumption against counsel could be overcome only where the parents interests and risks were at their absolute maximum. *Id.* at 31-32.

This *Lassiter* presumption is not part of state law in termination proceedings. Washington statutes have long required *mandatory* provision of counsel to parents in termination proceedings without requiring that the parent's physical liberty be at stake. RCW §13.34.090(2). Additionally, state law allows judges to appoint counsel to represent children in termination proceedings without any determination

that the children's physical liberty is at stake. *See* RCW §13.34.100(6). These statutes support finding a state constitutional due process guarantee of counsel for children in termination proceedings that is *not* limited by the *Lassiter* presumption. *Gunwall*, 106 Wn.2d at 61-62 (explaining that state statutory law may help define the scope of a constitutional right).

Decisions of this Court are also clear that Article 1, Section 3 imposes no presumption against counsel in termination proceedings. In *Welfare of Luscier* the Court stated that a parent's right to counsel in a termination proceeding was mandated by *both* the Fourteenth Amendment *and* Article 1, Section 3. 84 Wn.2d at 138. Contrary to the conclusion reached in *Lassiter*, *Luscier* considered the possibilities of deprivation of physical liberty and deprivation of the parent-child relationship side by side and concluded that "[s]urely the reasoning of Argersinger, which requires the appointment of counsel if there is the possibility of even a 1-day jail sentence, must also extend to a proceeding where a parent may be deprived of a child forever." *Id.*[4] This conclusion has been subsequently confirmed both pre- and post-*Lassiter*. In *Welfare of Myricks*, 85 Wn.2d 533 P.2d 841 (1975) the Court found, citing *Luscier*, that the "key issue in determining whether counsel should be present in a proceeding is whether

[4] Citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972), a case which found a right to counsel after recognizing that imprisonment was a possibility.

the individual is being deprived of 'liberty,'" a finding that in the context of the case necessarily included "liberty" interests in familial integrity exceeding physical liberty. Subsequent to *Lassiter*, this Court has also held that "the right to counsel in child deprivation proceedings . . . except in limited circumstances finds its basis solely in state law." *Welfare of Hall*, 99 Wn.2d 842, 846, 664 P.2d 1245 (1983) (*citing Luscier* and distinguishing *Lassiter* as requiring counsel only in "limited circumstances"). Firmly foreclosing any argument that the *Lassiter* presumption is an element of Article 1, Section 3, this Court has expressly held post-*Lassiter* that "the constitutional right to legal representation is presumed to be limited to those cases in which the litigant's physical liberty is threatened *or where a fundamental liberty interest, similar to the parent-child relationship*, is at risk." *In re Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (emphasis added).

Turning briefly to the remaining nonexclusive *Gunwall* factors, it is true that the text of the due process clause of the Fourteenth Amendment and Article 1, Section 3 are substantially similar. However, the State fails to present any justification for treating this similarity as an indication that state constitutional rights in this context are coextensive with the federal constitution. Moreover, this Court has previously held that the United States Supreme Court's interpretation of the Fourteenth

Amendment does not control its interpretation of Article I, section 3. *See State v. Bartholomew*, 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984).

The third and fifth *Gunwall* factors, the history and structure of the Washington State Constitution, as explained in the Children's opening brief, also support reliance on the state constitution here. *See* Children's Brief, pp. 40-44. Finally, concerning the sixth *Gunwall* factor, whether the subject is a matter of particular state or local concern, the Children's brief correctly points out that matters of familial relations between parent and child, as well as the treatment and rights of juveniles, are matters of state, and not federal, concern. *See* Children's Brief, pp.44-45.

This Court should find that there are principled and important reasons, even within a *Gunwall* analysis, to decide that children have a right to counsel in termination proceedings under Article 1, Section 3.

### 3. Like Washington, Other States Have Independently Interpreted their State Due Process Clauses to Require Appointment of Counsel in Cases where the Fundamental Interest in a Parent-Child Relationship is at Stake.

Washington is not the only state to find that the *Lassiter* presumption does not limit their state constitution's right to counsel in termination proceedings. *See, e.g., In re KLJ*, 813 P.2d 276, 278-80 (Alaska 1991) (undertaking *Matthews v. Eldridge* balancing under state constitution without limiting outcome based on additional balancing

against *Lassiter* presumption); *V.F. v. State*, 666 P.2d 42 (Alaska 1983) (upholding parent's right to counsel under state constitution's due process clause based solely on the liberty interests inherent in raising one's child). In *In re KLJ* the Alaska Supreme Court expressly rejected *Lassiter's* reasoning, adopting a "bright line" right to counsel in termination proceedings because the private interests are weighty, the procedure is fraught with error, and the government's countervailing interests are insubstantial. *Id.*, 813 P.2d at 282, n.6 (*citing Lassiter*, 452 U.S. at 48-49 (Blackmun, J., dissenting) (noting also the procedural burden of a case-by-case analysis on lower courts)). Montana has likewise followed this trend and held that a parent has a state constitutional due process right to counsel in termination proceedings, because of "the substantial risk of an unfair procedure and outcome, and the guarantee under our Constitution of fundamental fairness." *In re ASA*, 258 Mont. 194, 852 P.2d 127 (1993). These cases further demonstrate the appropriateness of an independent state constitutional analysis. They also support the conclusion that in termination proceedings – where the fundamental liberty interest in the parent-child relationship is at stake and where there is a substantial risk of an unfair procedure and outcome – appointed counsel is required to satisfy state due process, not only for the parent, but also for the child.

## V. CONCLUSION

For the reasons stated herein and in the Children's briefs, the absence of counsel for children in parental termination proceedings is a due process violation. This Court should recognize this right under the Washington State Constitution for all children in parental termination proceedings.

RESPECTFULLY SUBMITTED this 28th day of December, 2010.

American Civil Liberties Union of
Washington Foundation

By /s/ Jared Van Kirk
Jared Van Kirk
WSBA No. 37029
GARVEY SCHUBERT BARER
1191 Second Avenue, Suite 1800
Seattle, WA 98101-2939
(206) 464-3939

Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
M. Rose Spidell, WSBA #36038
ACLU-WA Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98168
(206) 624-2184

Attorneys for Amicus Curiae American Civil Liberties Union of Washington